

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Request for Review by Qwest Communications)	WC Docket No. 03-109
International, Inc. of Decision of Universal)	
Service Administrator)	

**REQUEST FOR REVIEW BY QWEST COMMUNICATIONS
INTERNATIONAL INC. OF DECISION OF THE UNIVERSAL
SERVICE ADMINISTRATOR**

Craig J. Brown
Tiffany West Smink
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005
(303) 383-6619
craig.brown@qwest.com
tiffany.smink@qwest.com

QWEST COMMUNICATIONS
INTERNATIONAL INC.

Its Attorneys

April 25, 2008

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**I. GENERAL SUMMARY STATEMENT OF INTEREST, ISSUES FOR
REVIEW, AND RELIEF REQUESTED**

Pursuant to Sections 54.719(c), 54.721 and 54.722 of the Federal Communications Commission's ("Commission") rules,¹ Qwest Communications International Inc., on behalf of its wholly-owned subsidiary, Qwest Corporation ("Qwest"), seeks review of certain findings by the High Cost and Low Income and Internal Audit Divisions of the Universal Service Administrative Company ("USAC") in three audits of federal universal service support Qwest received from the low-income universal service program.

Qwest has been designated as an eligible telecommunications carrier ("ETC") in fourteen states in which it is an incumbent local exchange carrier. In accord with that designation, Qwest offers and provides discounts on telephone service to eligible low-income customers, and seeks reimbursement for the discounts from the federal universal service low-income program by completing and submitting an FCC Form 497 to USAC each month.

By letter dated March 3, 2006, USAC informed Qwest that it was initiating an audit of Qwest for universal service support it received from the low-income program for January 2006

¹ 47 C.F.R. §§ 54.719(c), 54.721, 54.722.

for three of its study areas: 355141 (Iowa), 465102 (Colorado) and 475103 (Southern Idaho).²

The final audit reports for each study area were shared with Qwest in early 2008, and Qwest subsequently received the letters initiating the time to appeal the audit findings dated February 26, 2008 for Colorado and Idaho and dated March 18, 2008 for Iowa.³

Qwest now seeks review of certain of the USAC audit findings contained therein. Specifically, Qwest seeks review of the following USAC determinations: (1) Qwest must complete line 9 of FCC Form 497 to report pro-rata Lifeline credit amounts provided to customers who only had Lifeline service for part of the reported month; (2) Qwest is inappropriately seeking enhanced Lifeline support for customers that do not reside on tribal lands; and (3) Qwest has failed to retain customer certifications in accord with 47 C.F.R. § 54.417(a). Qwest seeks reversal of each of these findings such that the Commission determines that (1) Qwest is not obligated to report partial Lifeline credit amounts on FCC Form 497 line 9; (2) Qwest is appropriately seeking enhanced Lifeline support for customers who certify that they live on tribal lands; and (3) Qwest is retaining customer certifications in accord with 47 C.F.R. § 54.417(a).

² Initially, this auditing exercise began as a single audit of three study areas, but it ended with three separate audit reports -- one for each study area -- that were not completed at the same time or by the same auditor.

³ Letter from Pam Gallant, USAC, to Shelly Eggert, Qwest, regarding Results of 2006 Low Income Limited Review of Qwest Colorado dated Feb. 26, 2008 with attached Audit Report (hereinafter "Colorado Audit Results"), attached hereto as Attachment 3; Letter from Pam Gallant, USAC, to Shelly Eggert, Qwest, regarding Results of 2006 Low Income Limited Review of Qwest Idaho dated Feb. 26, 2008 with attached Audit Report (hereinafter "Idaho Audit Results"), attached hereto as Attachment 4; Letter from Pam Gallant, USAC, to Shelly Eggert, Qwest, regarding Results of 2006 Low Income Limited Review of Qwest Iowa dated Mar. 18, 2008 with attached Audit Report (hereinafter "Iowa Audit Results"), attached hereto as Attachment 5. Direct reference to USAC findings for which Qwest has not sought review in this request have been omitted from these three attachments.

II. SPECIFIC ISSUES FOR REVIEW (INCLUDING REFERENCES TO RELEVANT MATERIAL FACTS AND SUPPORTING DECLARATIONS AND DOCUMENTATION)

A. Qwest Is Not Obligated To Report Partial Lifeline Credit Amounts On FCC Form 497 Line 9.⁴

For each of the three audits, USAC made a finding that Qwest needed to use Line 9 on FCC Form 497 to report pro-rated amounts of Lifeline credits provided in the reported month to customers who began or ended service during the month.⁵ Qwest provides pro-rated Lifeline support to customers who start or end Lifeline service during a month. But, Qwest's system for data collection to complete the Form 497 filing each month does not enable identification of these pro-rated amounts such that Qwest could use Line 9 to report those amounts on the Form 497. To capture the number of Lifeline subscribers to be reported on the Form 497 each month, Qwest executes a query on or near the end of the month to its corporate data warehouse ("CDW") database to count all of the customer accounts receiving Lifeline service in each state on that date. Thus, this query generally captures the customer accounts that either initiated Lifeline service or continued the service for that month. It will not capture customer accounts that discontinued Lifeline service in that month. This query does not allow Qwest to identify how many customer accounts initiated or terminated Lifeline service in the month. Based on the information collected from the query, on the Form 497, Qwest claims full-month Lifeline support for the customer accounts captured. Thus, for some subset of those accounts, Qwest is seeking reimbursement for full Lifeline credit amounts where it only provided partial credits to

⁴ The factual statements regarding Qwest Lifeline service and Qwest's processes for preparing FCC Form 497 in this section are affirmed by the Declaration of Diana Urquhart attached to this Request for Review as Attachment 1.

⁵ Attachment 3, Colorado Audit Results, at 1 & Finding #1; Attachment 4, Idaho Audit Results, at 1 & Finding #1; Attachment 5, Iowa Audit Results, at 2 & Finding #4.

the customers during that month. At the same time, on the Form 497, Qwest claims no Lifeline support amounts for any customer accounts that terminated Lifeline service during the month. Thus, for some group of customer accounts, Qwest is not seeking any reimbursement for Lifeline credit amounts even though it provided partial Lifeline credits to those customers during the month. Over time and large volumes of customers, this process should result in very similar amounts of low-income support being reimbursed to Qwest and provided to Qwest Lifeline customers. In fact, so far, Qwest's analysis of journaled data from customer bills for the last three years indicates that overall Qwest's reimbursements from USAC are less than the federal Lifeline support Qwest has actually provided to its Lifeline customers. Thus, there is nothing to indicate that either the federal universal low-income support fund or Qwest's Lifeline customers are harmed by this process.

Yet, in spite of this innocuous situation, USAC finds that "Qwest must complete Line 9 on FCC Form 497 when seeking reimbursement for subscribers who did not receive Lifeline support for an entire month."⁶ This finding, however, is refuted by the plain language of the Form 497 instructions for completing the form, by the history behind the instruction language, and by the unwarranted burden of requiring Qwest to report partial Lifeline credit amounts in the absence of any cognizable harm to the federal universal service fund or Qwest's Lifeline customers using the current process.

First, the plain language of the current instructions for completing Line 9 of FCC Form 497 states the following in relevant part:

If claiming partial or pro-rata dollars, check the box on line 9. Enter the dollar amount (if applicable) for all partial or pro-rated subscribers. Amounts should be reported in whole dollars, and may be either positive or negative, depending on

⁶ Attachment 3, Colorado Audit Results, Finding #1; Attachment 4, Idaho Audit Results, Finding #1; Attachment 5, Iowa Audit Results, Finding #4.

whether there are more new subscribers being added part way through a month or more subscribers disconnecting during the reported month.⁷

Clearly, the plain language of the Form 497 instructions does not require that pro-rated credit amounts for partial-month customers be claimed. The plain language of the instructions leaves the decision of whether to claim any partial amounts up to the reporting entity.

Second, to date this Commission has considered, but declined to amend the Form 497 to require ETCs to report the number of Lifeline customers receiving Lifeline support for part of a month.⁸

Third, the burden on Qwest to capture partial amounts data is not justified. Qwest would need to completely overhaul its present systems for data collection in order to attempt to capture partial amounts. Data on Lifeline customers might need to be captured on a daily basis in order to identify when customers initiated or terminated Lifeline service. Qwest currently has approximately 331,000 Lifeline customers throughout its fourteen-state incumbent local-exchange carrier region. It is uncertain whether a new system could be designed to sufficiently capture the universe of partial-month customers, capture the appropriate partial amounts, and enable defensible audit controls. And, the significant cost and resources spent would be to achieve an arguably more accurate reporting correspondence with no clear benefit to either the federal universal service program or the Qwest Lifeline customers served.

Thus, the Commission should reverse USAC's finding for each study area that Qwest is obligated to use Line 9 to report partial Lifeline support amounts. The plain language of the

⁷ Attachment 6, FCC Form 497 Instructions and Form, October 2000 (emphasis added).

⁸ See, Attachment 7, *In the Matter of Request for Review by AT&T Inc. of Decision of Universal Service Administrator*, Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed Jan. 7, 2008) at 3 (setting out facts of revised FCC Form 497 proposed in September 2004 that the Commission has not adopted).

Form 497 instructions does not require it; the Commission has previously considered, but not altered the form language or the instructions to require it; and any perceived benefit from requiring reporting of partial amounts is outweighed by the harm of requiring Qwest to implement significant system changes to comply with such a requirement.

B. Qwest Is Appropriately Seeking Tribal Lifeline Support For Customers Who Certify That They Live On Tribal Lands.⁹

Tribal Lifeline support provides additional discounts for telephone service to eligible low-income customers living on tribal lands.¹⁰ To be eligible for Tribal Lifeline support a customer must (1) meet the assistance-program-eligibility or income-eligibility criteria set out in 47 C.F.R. § 54.409 and (2) live on a reservation.¹¹ At the core of this request for review, Qwest seeks a Commission determination of the extent of a telephone service provider's obligation to ascertain whether the customer lives on a reservation. Qwest submits that it has fulfilled this obligation by obtaining a signed certification by the customer that he or she lives on a reservation. But, in its audit findings for Qwest in Idaho and Colorado, USAC interprets that

⁹ The factual statements regarding Qwest Lifeline and Tribal Lifeline services in this section are affirmed by the Declaration of Carol Rohrkemper attached to this Request for Review as Attachment 2.

¹⁰ See 47 C.F.R. § 54.403(a)(4). Qwest refers to its service offering of enhanced Lifeline to eligible customers living on tribal lands as "Tribal Lifeline."

¹¹ 47 C.F.R. § 54.400(e). Initially the tribal lands residency requirement included living "near a reservation", but that extension of the residency requirement was stayed by the Commission pending its further consideration of the appropriate definition of "near reservation" for enhanced Lifeline support purposes. *In the Matters of Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*; Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-208 (rel. June 30, 2000) at ¶¶ 16-19 (defining eligibility requirements to receive enhanced Lifeline support to include living on or near a reservation) (*Tribal Lifeline Order*); *In the Matters of Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 17112 (2000); 47 C.F.R. § 54.400, Note to paragraph (e).

Qwest's reliance on the customer's certification is not sufficient for ascertaining the customer's tribal residency.¹²

In southern Idaho, Qwest provides telephone service to about half of the Fort Hall reservation. Idaho is a state which mandates Lifeline support. In Idaho, the Idaho Department of Health and Welfare ("IDHW") contracts with the Community Action Partnership Association of Idaho ("CAPAI") to determine customer eligibility for Lifeline based on the customer's household income being at or below 133% of the federal poverty guidelines. Each month CAPAI sends Qwest an electronic file identifying which existing Qwest customers are eligible to receive Lifeline support and requests that Qwest add the credits to their account. CAPAI does not indicate whether the customers it identifies as eligible for Lifeline support are in fact eligible for enhanced Lifeline support.

In Colorado, Qwest provides telephone service to portions of the Southern Ute and Ute reservations. Colorado is also a state which mandates Lifeline support. In Colorado, the Colorado Department of Human Services ("CDHS") determines eligibility of consumers for Colorado's Low Income Telephone Assistance Program ("LITAP"). LITAP eligibility is based on the customer's participation in certain qualifying assistance programs. CDHS sends qualifying individuals a letter regarding the LITAP program and advises the individual to call his or her local telephone company to enroll in the program. When the individual calls Qwest, for new Qwest customers the Qwest service representative initiates an account with Lifeline service and for existing Qwest customers adds Lifeline to the customer's account. CDHS also electronically transmits a small file each week of customers eligible for Lifeline. CDHS does not

¹² Attachment 3, Colorado Audit Results, at 2 & Finding #4; Attachment 4, Idaho Audit Results, at 2 & Finding #4.

indicate whether the customers it identifies as eligible for LITAP are in fact eligible for enhanced Lifeline support.

To receive Tribal Lifeline support through Qwest, a customer must complete a Tribal Lifeline application. Qwest personnel processing Tribal Lifeline applications from customers do not have any information available to them to verify whether or not a customer's address is within tribal reservation boundaries. Qwest's systems do not identify whether a customer address is on a tribal reservation. Instead, Qwest relies on the customer's certification that he or she lives on a particular reservation. Qwest specifically requires the applicant to identify the reservation on which he or she lives, and requires the applicant to sign the application form and "certify under penalty of perjury that the above information is true."¹³

But, USAC does not interpret that this is sufficient. Relying on language in the Final Regulatory Flexibility Analysis of the Procedural Matters section of the Commission's *Tribal Lifeline Order*, USAC views that Qwest needs to establish additional controls to verify that a customer's address is on tribal lands prior to providing enhanced Lifeline support.¹⁴ But nowhere in the *Tribal Lifeline Order* or elsewhere does the Commission set out what a carrier must do to determine whether a customer is a resident of tribal lands.¹⁵

¹³ Attachment 8, Qwest Tribal Lifeline Application.

¹⁴ See Attachment 3, Colorado Audit Results, at Finding #4 and Attachment 4, Idaho Audit Results, Finding #4 relying on language in paragraph 180 of the *Tribal Lifeline Order*. Paragraph 180 of the *Tribal Lifeline Order* is not in the substantive law portions of the *Order*, but is in the portion of the *Order* addressing procedural matters related to the *Order* and describing projected reporting, recordkeeping and other compliance requirements. USAC's reliance on this language reveals the lack of substantive Commission guidance on this issue.

¹⁵ Nor does USAC provide any suggestions in the audit results as to what additional controls Qwest should establish to ensure that only residents of tribal lands receive enhanced Lifeline support. Further, there is nothing on the USAC website that offers any guidance on this issue. See <http://www.universalservice.org/li/low-income/eligibility/tribal.aspx>.

Further, in the absence of any clear Commission statement on how a provider should confirm tribal residency, USAC's finding cannot be sustained. In finding that Qwest's current conduct in relying on customers' self-certifications of tribal residency is not compliant conduct for ascertaining tribal residency and determining to disgorge monies from Qwest for this non-compliance, USAC is engaging in retroactive rule-making. This is problematic for at least two reasons. First, USAC has no authority to interpret Commission rules, but only has authority to apply existing Commission rules.¹⁶ Second, rules are generally required to be prospective in nature in order to provide individuals notice of the rule and an opportunity to conform their conduct to the rule. USAC's application of its new interpretive rule to Qwest's past conduct is prohibited retroactive rulemaking.¹⁷

Thus, the Commission should determine that Qwest's process of obtaining a signed certification from the customer that he or she resides on a reservation satisfies the carrier's obligation to ascertain tribal residency of a Tribal Lifeline customer. The Commission should reverse USAC's findings for Qwest in Colorado and Idaho on this issue and USAC's intended recovery actions on this issue.¹⁸

¹⁶ See 47 C.F.R. § 54.702(c) (stating that [t]he Administrator may not make policy, interpret unclear provisions of the statute or rules or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”).

¹⁷ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988) and discussion of retroactive rulemaking in Section II.C, *infra*.

¹⁸ Alternatively, if the Commission views that additional steps for ascertaining tribal residency may be warranted, the Commission should initiate a rulemaking to consider and solicit comment on what additional steps might be appropriate and feasible for carriers and state agencies involved in eligibility determinations to implement. Qwest has attempted to find a resource that would enable checking whether a particular service address is on tribal lands, but has not found a simple or reliable way to do this.

C. Qwest Is Retaining Customer Certifications In Accord With 47 C.F.R. § 54.417(a).¹⁹

Section 54.417(a) of the Commission's rules sets out certain document retention requirements for the Lifeline program. During January 2006, the time period of the subject audits, that provision required that ETCs "maintain" the customer self-certifications of eligibility in states that do not mandate state Lifeline support "for as long as the consumer receives Lifeline service from that eligible telecommunications carrier or until audited by the Administrator."²⁰ But, this document retention requirement was not adopted until April 2004, and was not effective until May 12, 2005.²¹ Iowa is a state that does not mandate state Lifeline support, such that Section 54.417(a)'s document retention requirements apply to Qwest's provision of Lifeline support to customers in Iowa.

USAC found that Qwest is not maintaining customer certification forms in Iowa in accord with Section 54.417(a).²² As Qwest explained to USAC during the audit, Qwest is maintaining and always has maintained adequate records to ensure that Lifeline and Link-Up support is provided to only eligible low-income consumers. Prior to May 12, 2005, when the requirement to retain the self-certification documentation set out in 47 C.F.R. § 54.417(a) became effective, Qwest considered the placement of a permanent note on the customer's account at that time Lifeline was added adequate documentation to substantiate a customer's

¹⁹ The factual statements regarding Qwest's document retention policies and practices for its Lifeline service in this section are affirmed by the Declaration of Carol Rohrkemper attached to this Request for Review as Attachment 2.

²⁰ 47 C.F.R. § 54.417(a).

²¹ Notices, FCC, Public Information Collections Approved by Office of Management and Budget, 70 FR 30110, May 25, 2005 (providing notice of the effective date of May 12, 2005 for certain FCC low-income program rules including Section 54.417); *In the Matter of Lifeline and Link-Up*, Report and Order, 19 FCC Rcd 8302 (2004) (adopting Section 54.417).

²² Attachment 5, Iowa Audit Results at 1 & Finding #2.

eligibility for Lifeline service. The permanent note demonstrated that the customer's request for Lifeline service had been processed through Qwest's Telephone Assistance Plan Center in Omaha, where trained personnel and company policies ensured that a signed self-certification had been received before the Lifeline credits were applied to an account. Since May 12, 2005, Qwest has complied with the record-keeping requirements set forth in 47 C.F.R. § 54.417(a) as is evidenced by the fact that during the audit Qwest was able to provide copies of all self-certifications for customers who had initiated Lifeline service since May 12, 2005, requested by the auditor.

Qwest should not be penalized for failing to retain customer self-certifications prior to the time that there was an effective obligation to do so. Rules are to be implemented prospectively, and any effort to implement rules retrospectively where no statutory authority exists to do so, as is being done here, violates the federal Administrative Procedure Act.²³ Here, in faulting Qwest for not retaining self-certifications that were obtained prior to the time the retention rule went into effect, USAC is judging Qwest's prior conduct by applying the requirements of 47 C.F.R. § 54.417(a) retroactively. This is patently unfair and contrary to deeply rooted legal jurisprudence.²⁴

USAC responded in its audit finding that it is not applying Section 54.417(a) retroactively because the audit period was January 2006, which was subsequent to the effective date of the rule. But, this does not change the fact that USAC is in fact requiring Qwest to

²³ See *Bowen v. Georgetown University Hospital*, 488 U.S. at 208-09 (stating that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result").

²⁴ See *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (stating that "the presumption against retroactive legislation is deeply rooted in our jurisprudence . . . [e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . .").

produce self-certifications for customers who had certified their eligibility prior to the time Qwest had an obligation to maintain the customer's self-certification pursuant to Section 54.417(a). In order for Qwest to have satisfied USAC's request for self-certifications for customers who have been eligible for Lifeline service since before May 2005, Qwest would have had to have all of its current customers that had initiated Lifeline service before May 2005 in federal default states re-certify their eligibility for Lifeline services. But, the Commission has never explicitly imposed such an obligation. And, in the absence of any such requirement, the document retention requirements of Section 54.417(a) must be read to impose only an obligation to retain self-certifications starting from the effective date of the rule.

Thus, the Commission should determine that Section 54.417(a) can not be applied retroactively and thus does not include an obligation for ETCs to obtain self-certifications from all of their existing customers in federal default states that initiated Lifeline service before the effective date of the rule. The Commission should find that Qwest is maintaining customer self-certifications of eligibility for Lifeline service in Iowa in compliance with Section 54.417(a) and reverse USAC's finding to the contrary and USAC's intended recovery action on this issue.

III. CONCLUSION: SUMMARY OF REQUESTED RELIEF

For the reasons stated above Qwest respectfully requests that the Commission reverse the USAC findings addressed above to provide the following relief: (1) determine that Qwest is not obligated to report partial Lifeline support amounts on the Form 497 for customers who begin or end Lifeline service during the month; (2) determine that Qwest's process of obtaining a signed certification from the customer that he or she resides on a reservation satisfies the carrier's obligation to ascertain tribal residency of a Tribal Lifeline customer and vacate USAC's intended recovery actions on this finding in the amount of \$95; and (3) determine that Qwest is

maintaining customer self-certifications of eligibility for Lifeline service in Iowa in compliance with Section 54.417(a) and vacate USAC's intended recovery action on this finding in the amount of \$210.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Tiffany West Smink
Craig J. Brown
Tiffany West Smink
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005
(303) 383-6619
craig.brown@qwest.com
tiffany.smink@qwest.com

April 25, 2008

Attorneys for Qwest

LIST OF ATTACHMENTS

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| Attachment 1 | Declaration of Diana Urquhart |
| Attachment 2 | Declaration of Carol Rohrkemper |
| Attachment 3 | Letter from Pam Gallant, USAC, to Shelly Eggert, Qwest, regarding Results of 2006 Low Income Limited Review of Qwest Colorado dated Feb. 26, 2008 with attached Audit Report |
| Attachment 4 | Letter from Pam Gallant, USAC, to Shelly Eggert, Qwest, regarding Results of 2006 Low Income Limited Review of Qwest Idaho dated Feb. 26, 2008 with attached Audit Report |
| Attachment 5 | Letter from Pam Gallant, USAC, to Shelly Eggert, Qwest, regarding Results of 2006 Low Income Limited Review of Qwest Iowa dated Mar. 18, 2008 with attached Audit Report |
| Attachment 6 | FCC Form 497 Instructions and Form, October 2000 |
| Attachment 7 | <i>In the Matter of Request for Review by AT&T Inc. of Decision of Universal Service Administrator</i> , Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed Jan. 7, 2008) |
| Attachment 8 | Qwest Tribal Lifeline Application |

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **REQUEST FOR REVIEW BY QWEST COMMUNICATIONS INTERNATIONAL INC. OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR** to be: 1) filed via ECFS with the Office of the Secretary of the FCC in WC Docket No. 03-109; 2) served on David Capozzi of the Universal Service Administrative Company via first-class United States Mail, postage pre-paid, as follows; and 3) served on Jennifer McKee of the Telecommunications Access Policy Division of the Wireline Competition Bureau of the FCC via first-class United States Mail, postage pre-paid, as follows:

David Capozzi
Acting General Counsel
Universal Service Administrative Company
Suite 200
2000 L Street, N.W.
Washington, DC 20036

Jennifer McKee
Acting Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

/s/ Ross Dino

Ross Dino

April 25, 2008